LIEW CHOONG KIN v. KETUA PENGARAH TANAH DAN GALIAN WILAYAH PERSEKUTUAN KUALA LUMPUR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[CIVIL SUIT NO: WA-21NCVC-85-12-2015]
15 FEBRUARY 2018

LAND LAW: *Acquisition of land – Compensation – Owner accepting compensation without protest – Whether could subsequently file writ action in High Court to seek damages for trespass – Whether issue of trespass ought to be raised at land inquiry proceeding before Land Administrator – Whether writ action unsustainable in law – Whether to be summarily dealt with – Land Acquisition Act 1960 ss. 8, 30, 36, 37, 38, First Schedule - Rules of Court 2012 O. 14A r. 1, O. 33 r. 2*

LAND LAW: *Acquisition of land – Compensation – Declaratory relief – Owner accepting compensation without objection – Owner subsequently filed writ action in High Court to seek damages for trespass – Whether declaratory relief could be granted when statutory remedy was available to owner – Whether declaratory relief barred by concept of uno flatu – Whether writ action unsustainable – Land Acquisition Act 1960 ss. 8, 30, 36, 37, 38, First Schedule – Rules of Court 2012 O. 14A r. 1, O. 33 r. 2*

The plaintiff was the owner of a piece of land in Kuala Lumpur which the Government had acquired by way of Gazette Declaration of 20 January 2005 for the construction of a highway. The facts showed that following the declaration, the Land Administrator conducted an inquiry in respect of the land, but no award of compensation was made as a result thereof. On 19 January 2007, the Gazette Declaration lapsed by virtue of s. 8(4) of the Land Acquisition Act 1960 ('LAA'). The lapse and non-payment of compensation notwithstanding, the third defendant Konsortium Lebuhraya Utara-Timur ('D3'), in whose behalf the land was acquired, commenced construction of the highway and had the same completed in 2009. Be that as it may, some four years later, by letter dated 21 June 2013, the plaintiff sought compensation for the Land, and the first defendant, the Ketua Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur ('D1') responded by publishing a second Gazette Declaration dated 1 December 2014, declaring that the land was required for the construction of the highway. D1 then held a second inquiry on 25 May 2015, and subsequently issued an offer of compensation in the amount of RM1,116,000 to the plaintiff ('the award'). The plaintiff accepted the award without any protest. However, on 18 December 2015, the plaintiff filed a writ of summons against the defendants seeking damages for trespass of the land from the period 2005 till May 2015. Before the High Court, multiple applications were filed by the parties, *inter alia* for summary judgment and striking out, but eventually, after several appeals and cross appeals to the Court of Appeal

and the Federal Court, the apex court remitted the plaintiff's suit to the High Court for trial. Pending that, however, D3 filed an application under O. 14A r. 1 Rules of Court 2012 beseeching the High Court to determine the question of law of whether the plaintiff, after accepting the award of compensation without objection, was precluded from maintaining an action for trespass against the defendants ('encl. 109'). Before the learned judge, the plaintiff pleaded *res judicata* and issue estoppel arguing that the issue in encl. 109 had already been considered by the Federal Court at the appeal stage. It was also argued that the matter of damages for trespass ought to be heard by the High Court as the same was not amenable to adjudication before the Land Administrator, citing in support thereof *Lembaga Amanah Sekolah Semangat Malaysia v. Collector of Land Revenue, Dindings ('Lembaga Amanah Sekolah Semangat Malaysia')* and *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Ulu Langat & Another Case ('Semenyih Jaya')*.

Held (answering question in the affirmative; striking out plaintiff's suit):

(1) The Federal Court had not considered the issue of whether it was an abuse of process for the plaintiff to file a claim for trespass after it had accepted the award of compensation after the second inquiry without objection. From the chronology of the case, it could be concluded that the Federal Court did not have the benefit of reading the Court of Appeal's grounds of judgment since it was issued more than a month after the hearing of the Federal Court. Without the benefit of the judgment, it would be impossible for the Federal Court to ascertain the reasons why the Court of Appeal disagreed with the High Court and why it held that this case should be struck out. It followed that there was no merit in the plaintiff's contention that the Federal Court had expressly or impliedly agreed with the High Court that the plaintiff was not precluded from maintaining this action for trespass against D3. It follows further that encl. 109 was not barred by *res judicata*. (paras 21-24)

(2) The Land Administrator is not prohibited by para 3(c) of the First Schedule LAA from considering damages for trespass when determining the amount of compensation in an Inquiry. Likewise, the decision in *Lembaga Amanah Sekolah Semangat Malaysia* does not support the contention that the LAA does not empower the Land Administrator in a land acquisition inquiry to award damages for trespass that was caused by a third party before the acquisition. Para 3 of the First Schedule LAA stipulates matters which the Land Administrator must not consider in determining the amount of compensation and these matters include damages which are not actionable. However, it is an elementary principle of law that the tort of trespass if caused by a private person is a good cause of action. Further, the case of *Semenyih Jaya* also does not support the proposition that only the courts can decide the issue of trespass. (paras 31, 32 & 35)

(3) The LAA, by its ss. 30, 36, 37 and 38, provides specific remedies for interested persons who are dissatisfied with the sufficiency of amount of award received from the Land Administrator. The Act however limits the remedy available to the interested person by expressly stipulating on the manner in which interested person can make the objection, the grounds of the objection, the form and content of the application, the time to make the application and the person who can make the reference to the court (*ie*, only the Land Administrator). It is clear, upon a plain reading of these provisions that the rights and remedies under the LAA are *uno flatu* for a person dissatisfied. For this reason, and based on the authority of *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillian Berhad* (where the Federal Court held that because the right and remedy under s. 418 of the National Land Code was *uno flatu*, *ie*, not mutually exclusive, it therefore bars declaratory relief), this court must hold that it has no jurisdiction to hear the claim for declaratory relief sought by the plaintiff in this present suit. (paras 54 & 56)

(4) On the facts and in the circumstances of this case, a cause of action anchored solely on trespass was clearly unsustainable. For this and other reasons alluded to herein, the answer to the question of law posed for this court's determination in this application ought to be in the affirmative. Consequently, the plaintiff was precluded from maintaining an action for trespass against the defendants after having accepted D1's award without any objection. (paras 58-63)

Obiter:

(1) The plaintiff could have under s. 30(a) of the LAA after the second inquiry accepted the compensation awarded by D1 under protest. If he had done so, he could then make an objection under s. 37 of the LAA and file Form N requiring D1 to refer the matter to the High Court. This he did not do and instead he filed the present writ of summons. The plaintiff clearly could have enforced his right in accordance with the LAA and if he had done so, to paraphrase the Federal Court in *Metal Industry Employees Union v Registrar of Trade Unions & Ors*, his claim "would have been settled one way or another". (paras 44, 45 & 57)

Case(s) referred to:

ASMTH Sdn Bhd & Anor v. Pentadbir Tanah Daerah Johor Bahru & Anor [2007] 8 CLJ 445 HC ***(dist)***

Cahaya Baru Development Berhad v. Lembaga Lebuhraya Malaysia [2010] 8 CLJ 761 FC ***(refd)***

Cheah Theam Kheng lwn. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Danaharta Managers Sdn Bhd v. Melewar Leisure Sdn Bhd & Ors [2008] 1 LNS 200 HC ***(refd)***

Express Newspapers Plc v. News (UK) Ltd And Others [1990] 3 All ER 376 ***(refd)***

A *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad [1980] 1 LNS 150 FC* ***(foll)***
Lembaga Amanah Sekolah Semangat Malaysia v. Collector of Land Revenue, Dindings [1976] 1 LNS 58 HC ***(refd)***
Lembaga Lebuhraya Malaysia v. Cahaya Baru Development Bhd [2010] 4 CLJ 419 CA ***(foll)***
B *Manggai v. Government of Sarawak [1970] 1 LNS 80 FC* ***(refd)***
Metal Industry Employees Union v. Registrar of Trade Unions & Ors [1975] 1 LNS 104 FC ***(refd)***
Ng Chee Keong & Ors v. Lembaga Letrik Negara & Anor [1991] 1 CLJ 567 HC ***(foll)***
Nora Hayati Ismayatim v. Amanah Raya Bhd [2012] 10 CLJ 634 HC ***(refd)***
Palatine Graphic Arts Co Ltd v. Liverpool City Council [1986] QB 335 ***(refd)***
C *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Ulu Langat & Another Case [2017] 5 CLJ 526 FC* ***(refd)***
Sugi Sinar Sdn Bhd v. Bank Muamalat Malaysia Bhd; Small Medium Enterprise Development Bank Malaysia Berhad (Third Party) [2017] 1 LNS 62 HC ***(refd)***
Tan Yoke Kwee & Ors v. Sistem Lingkaran Lebuhraya Sdn Bhd & Ors [2010] 2 CLJ 653 HC ***(refd)***
D

Legislation referred to:
Land Acquisition Act 1960, ss. 8(1), (4), 14, 16, 30, 36(1), (2), 37(1)(a), (b), (c), (3), 38(1), (3)(a), (b), 40D, First Schedule paras 2, 3(c)
National Land Code, s. 418
Rules of Court 2012, O. 14A r. 1, O. 18 r. 19(1), O. 33 r. 2
E

For the plaintiff - S Balan & C Balasundran; M/s Azman Joseph & Assocs
For the 1st defendant - Narkunavathy Sundareson; SFC
For the 2nd defendant - Mohamed Nazmie; M/s Tan Norizan & Assocs
For the 3rd defendant - R Jeyasingam & Ng Keng Yang; M/s BH Lawrence & Co

F *Reported by Wan Sharif Ahmad*

JUDGMENT

Faizah Jamaludin JC:

G **Introduction**

[1] This is an application (encl. 109) by the third defendant under O. 14A r. 1 of the Rules of Court 2012 ("ROC") or alternatively under O. 33 r. 2 of the ROC for this court to determine following question of law:

H > Whether the Plaintiff is precluded from maintaining an action for trespass against the Defendants after having accepted the First Defendant's award of compensation without any objection?

[2] On 25 January 2018, a consent order was entered in respect of the question of law to be determined by this court pursuant to encl. 109 and the consequences of the said determination.

I

[3] The consent order is reproduced below:

MAKA ADALAH DIPERINTAHKAN SECARA PERSETUJUAN bahawa soalan berikut didengar dan diputuskan di bawah Aturan 14A kaedah 1 Kaedah-Kaedah Mahkamah 2012 dan/atau Aturan 33 Kaedah 2 Kaedah-Kaedah Mahkamah 2012:

"Sama ada Plaintif dihalang dari mengekalkan suatu tindakan untuk pencerobohan terhadap Defendan-Defendan setelah menerima awad pampasan Defendan Pertama tanpa sebarang bantahan?"

"Whether the Plaintiff is precluded from maintaining an action for trespass against the Defendants after having accepted the First Defendant's award of compensation without any objection?"

DAN SELANJUTNYA DIPERINTAHKAN SECARA PERSETUJUAN bahawa:

(i) Sekiranya soalan tersebut diputuskan memihak kepada Pemohon-Pemohon/Defendan-Defendan maka keseluruhan tindakan Plaintif terhadap Defendan-Defendan hendaklah dibatalkan;

(ii) Sekiranya soalan tersebut diputuskan memihak kepada Plaintif maka tuntutan Plaintif akan ditetapkan untuk bicara penuh pada 12 Februari 2018 dan 15 Februari 2018; dan

(iii) Defendan-Defendan terhalang dari membangkitkan isu tersebut semasa bicara penuh tertakluk hanya kepada rayuan ke Mahkamah Rayuan dan Mahkamah Persekutuan, sekiranya ada.

Background

[4] The third defendant ("D3") was awarded the concession to construct a highway known as Lebuhraya Duta-Ulu Kelang or DUKE Highway (the 'Highway'). The plaintiff was the then landowner of a piece of property described as HS (M) 1317, No. PT 259, Hot Spring New Village, Mukim Setapak, Negeri Wilayah Persekutuan (the "land") that was acquired for the construction of the Highway.

[5] The first defendant ('D1') commenced land acquisition proceedings in 2005 where by a Federal Gazette No. 365 dated 20 January 2005[1] published a "declaration of intended acquisition" pursuant to s. 8 of the Land Acquisition Act 1960 ("LAA") ('first declaration'). It was stated in the first declaration that ownership of the land cannot be traced ("hakmilik tidak dapat dikesan").

[6] Pursuant to s. 8(4) of the LAA, a declaration made by the State Authority under s. 8(1) of the LAA would lapse after two years from the date of publication of the declaration in the *Gazette*.

[7] A land acquisition inquiry (the "first inquiry") was held in 2005 in respect of the lands listed in the first declaration. However, no award was made to the plaintiff by the Land Administrator pursuant to the first inquiry. Accordingly, the first declaration lapsed and ceased to have any effect by 19 January 2007 by operation of s. 8(4) of the LAA.

[8] The construction of the Highway was completed in 2009. The Highway runs across the land.

[9] In 2013, by a letter dated 21 June 2013 from the plaintiff to D1, the plaintiff sought compensation for the land either (i) by replacing the land with the land of similar value in a different location such Kampung Baru Salak Selatan or (ii) by compensation based on the current market value or value agreed by a licensed valuer.[2]

[10] In response to the plaintiff's request for compensation, D1 commenced a second land acquisition proceedings in 2014 by publishing a declaration to acquire the land in Federal Gazette No. 42244 dated 1 December 2014 ("second declaration").[3] A second land acquisition inquiry (the "second inquiry") was held on 25 May 2015. The plaintiff attended the second inquiry. The plaintiff's claim at the second inquiry is based on his own land valuation report.[4]

[11] The plaintiff's land valuation report comprises of two parts, namely:

(i) compensation for the land for a (rounded-off) land area of 560 square meters at RM2,000 per square meter (based on the land value in 2014) for the sum of RM1,120,000; and

(ii) late payment charges for a ten year period from 2005 - 2014 in the sum of RM568,512 on the average land value (from 2005-2015) of RM1,269 per sq meter.

[12] At the conclusion of the second inquiry, D1 issued a form H (notice of award and offer of compensation) dated 14 May 2015 offering the plaintiff the sum of RM1,116,000 for the land. Item 2 of the form H states as follows:

> 2. Pada menurut pemberian ini maka saya dengan ini menawarkan kepada tuan/puan wang sebanyak RM1,116,000.00 jumlah wang yang dinyatakan di bawah ini sebagai pampasan penuh bagi kepentingan tuan/puan atas tanah ini.

[13] On 27 May 2015 the plaintiff accepted the award from D1 without any protest. The plaintiff after accepting the award also did not make any objection under s. 37 of the LAA 1960 in respect of D1's decision.

[14] On 18 December 2015, the plaintiff filed this present suit against the defendants for trespass of the land for the period from 2005 until 27 May 2015.

Agreed Facts

[15] The following are the agreed facts in respect of this application:

(i) the plaintiff was the then landowner of the land that was acquired for the construction of the Highway.

(ii) *via* the first declaration, it was declared that the land was required for a public purpose, namely the construction of the Highway.

(iii) D1 issued a public notice for the acquisition of the land in Form E of the LAA on 30 March 2005. No inquiry was held based on the said borang E.

(iv) *via* the second declaration, the land was declared as being required for the construction of the Highway.

(v) the plaintiff made a claim for the sum of RM1,120,000 for land value at the rate of RM2,000 per sq meter and RM568,512 for late payment charges at the rate of 8% for the period of ten years.

(vi) D1 awarded compensation for the sum of RM1,116,000 at the rate of RM2,000 per sq meter.

(vii) the plaintiff accepted the award of compensation from D1 without any objections.

Background And Chronology Of Case

[16] After participating in the second inquiry and accepting the award of compensation without protest, the plaintiff on 18 December 2015 filed this present action seeking a declaration against the defendants for trespass of the land for the period from 2005 until 27 May 2015.

[17] The chronology of this case is as follows:

DATE	EVENT
18.12.2015	The Plaintiff filed Writ of Summons and Statement of Claim.
6.04.2016	(Enc. 18): The Plaintiff filed an application to enter summary judgment against D1 under O.14 of the ROC.
2.12.2016	(Enc. 45): D3 filed an application to strike out this action under O.18 rr.19(1)(b) and/or (d) of the ROC.
15.12.2016	(Enc. 47): D2 filed an application to strike out this action under O.18 rr. 19(1)(a), (b) and/or (d) of the ROC.
16.12.2016	This Court dismissed the Plaintiff's application in Enc. 18.
16.02.2017	This Court dismissed D3s' and D2's applications in Enc. 45 and Enc. 47.
16.08.2017	Hearing of D3's appeal at the Court of Appeal. The Court of Appeal allowed D3's appeal. The order of the High Court was set-aside and D3's application in Enc. 45 to strike-out the action was allowed.

23.10.2017	Hearing of D2's appeal in respect of Enc.47 at the Court of Appeal. The Court of Appeal dismissed D2's appeal and ordered that the case be remitted to the High Court for trial.
02.11.2017	At the hearing of the Plaintiff's application for leave to appeal the Court of Appeal's decision on Enc. 45, the Federal Court granted the Plaintiff to appeal and allowed the Plaintiff's appeal simultaneously. The decision of the Court of Appeal was set aside and this case was remitted to the High Court for trial.
08.11.2017	Case management before judge in chambers in the High Court. This case was set down for trial on 29.01.2018, 5 - 7.02 2018 and pre-trial directions were given.
20.12.2017	The Court of Appeal issued its grounds of judgment in respect of its decision relating to Enc. 45.
16.01.2018	D3 filed the application in Enc. 109.
25.01.2018	A Consent Order, with the agreement of the parties, was entered for the question set out in paragraph [1] above to be heard and disposed of by this Court prior to the commencement of the trial.

Issues For Determination

Is This Application Barred By Res Judicata?

[18] The plaintiff submits that this court should dismiss D3's application in encl. 109 on the grounds of *res judicata*. He argues that issue estoppel exists because D3 had raised the same issue in its interlocutory application in encl. 45 to strike out the plaintiff's action and the issue was considered by the Court of Appeal and finally considered by the Federal Court.

[19] The High Court had on 16 February 2017 dismissed D3's application in encl. 45 to strike out the plaintiff's claim. D3 appealed against the High Court's decision to the Court of Appeal. On 16 August 2017, the Court of Appeal set aside the High Court's decision on the grounds that the action was an abuse of process of court. It allowed D3's application to strike out the plaintiff's claim. The plaintiff then applied for leave to appeal to the Federal Court against the Court of Appeal's decision. On 2 November 2017, at the hearing of the plaintiff's application for leave, the Federal Court granted the Plaintiff leave to appeal and at the same time allowed the plaintiff's appeal. The Federal Court set aside the decision of the Court of Appeal and directed that this case be remitted to the High Court for trial.

[20] The court records show that the hearing of the leave application before the Federal Court was on 2 November 2017. No reasons were given by the Federal Court as to why it set aside the Court of Appeal's decision. There is nothing in the notes of proceedings of the Federal Court to indicate that the Federal Court had considered the issue of whether it was an abuse of process for the plaintiff to file a claim for trespass after it had accepted the award of compensation after the second inquiry without objection.

[21] From the chronology of this case as set out in para. [17] above, it can safely be concluded that the Federal Court did not have the benefit of reading the Court of Appeal's grounds of judgment since it was issued more than a month after the hearing at the Federal Court.

[22] Without the benefit of the Court of Appeal's grounds of judgment, it would be impossible for the Federal Court to ascertain the reasons why the Court of Appeal disagreed with the High Court's decision and why it held that this case should be struck out. For this reason, I must disagree with the plaintiff's contention that the Federal Court had expressly or impliedly agreed with the High Court's decision that the plaintiff is not precluded from maintaining this action for trespass against D3.

[23] It has been held in *Danaharta Managers Sdn Bhd v. Melewar Leisure Sdn Bhd & Ors* [2008] 1 LNS 200; [2008] 4 AMR 80; [2008] 4 MLJ 448, referred to in *Nora Hayati Ismayatim v. Amanah Raya Bhd* [2012] 10 CLJ 634; [2012] 3 AMR 540 which in turn was followed in *Sugi Sinar Sdn Bhd v. Bank Muamalat Malaysia Bhd; Small Medium Enterprise Development Bank Malaysia Berhad (Third Party)* [2017] 1 LNS 62; [2017] MLJU 62 that a party who has made an interlocutory application under O. 18 r. 19(1) or O. 14 is not barred by *res judicata* from subsequently making an application under O. 14A.

[24] For these reasons, I find that D3's application in encl. 109 is not barred by *res judicata*. Thus, this court holds that D3 is not estopped from making the application under O. 14A of the ROC.

Does The Land Administrator Have The Power To Award Damages For Trespass In An Inquiry?

[25] The plaintiff argues that the Land Administrator in an inquiry does not have the power to award damages for trespass or damage caused by a third party. Counsel for the plaintiff, Mr S Balan, submits that there is no provision in the LAA for the Land Administrator to make an award for any heading other than "market value of the scheduled award". This submission is based on Mr Balan's reading of para. 3 of the First Schedule to the LAA.

[26] During the hearing of this application, counsel for the plaintiff submitted that damages for trespass cannot be considered by the Land Administrator in determining the amount of compensation because para. 3(c) of the First Schedule expressly states that it is not a good cause of action. He submitted that because of the provision in para. 3(c) of the First Schedule, for this court to hold that the Land Administrator has the power to award damages for trespass "would tantamount to usurpation by this court of the legislative function". He cites the case of *Lembaga Amanah Sekolah Semangat Malaysia v. Collector of Land Revenue, Dindings* [1976] 1 LNS 58; [1978] 1 MLJ 34 to support his contention that the LAA does not empower the Land Administrator to award damages for trespass that was caused by a third party before acquisition.

[27] Para. 3 of the First Schedule of the LAA states as follows:

> 3. Matters to be neglected in determining compensation
>
> In determining the amount of compensation to be awarded for any scheduled land acquired under this Act the following matters shall not be taken into consideration:
>
> ...
>
> (c) any damage sustained by the person interested which, if caused by a private person, would not be a good cause of action;

[28] Based on the plain reading of para. 3(c) of the First Schedule, in my view, the correct interpretation of para. 3(c) is that matters that cannot be considered by the Land Administrator when determining the amount of compensation include damages which, if caused by a private person, would not be actionable.

[29] This interpretation is supported by the *dicta* of Hashim Yeop A Sani J (as he then was) in *Lembaga Amanah Sekolah Semangat Malaysia*. It is the very case cited by the plaintiff's counsel but to support an entirely different proposition ie, that the Land Administrator does not have the power to award damages for trespass in a land acquisition inquiry.

[30] *Lembaga Amanah Sekolah Semangat Malaysia* relates to an objection under s. 37(1)(b) of the LAA against the amount of compensation awarded by the collector in respect of land compulsory acquired for the proposed site of the Royal Malaysian Navy Military Base. The outward bound school and buildings related to the school were situated on the land. The applicant contended that since the outward bound school should be regarded as a public purpose, the acquisition called for an "unusual principle" of compensation ie, that the principal of reinstatement should be applied in determining the amount of compensation. The High Court made a ruling in this case that the principle of reinstatement is not recognised by the LAA. Hashim Yeop A. Sani J held that para. 3 is material to the construction of para. 2 of the First Schedule. His Lordship held that:

> Our Land Acquisition Act, 1960 makes clear that the basis for determining adequacy of compensation is the market value and other factors set out in paragraph 2 of the First Schedule. All matters of compensation point to the First Schedule (see section 47(2) of the Act). ... All these provisions seem to me to be an express direction of the legislature to exclude all other considerations.
>
> **Material to the construction of paragraph 2 of the First Schedule to our Act but not argued before me are also the provisions of paragraph 3 of the First Schedule to our Act**. The contents of paragraph 3 correspond materially to the provisions of section 24 of the Indian Act and they deal

with matters which the court shall not take into consideration. Comparing paragraph 2 with paragraph 3 of the Schedule it is clearly seen that whereas *paragraph 2 deals with principles as basis for determining the amount of compensation paragraph 3 deals with matters which should not be considered in determining the amount of compensation because of their nature being either trivial (damages not otherwise actionable) or sentimental (disinclination on religious or other grounds) or matters not relevant to the value of the land to the owner.*

(emphasis added)

[31] With respect to counsel for the plaintiff, I am unable to agree with his proposition that the decision in *Lembaga Amanah Sekolah Semangat Malaysia* supports the plaintiff's contention that the LAA does not empower the Land Administrator in a land acquisition inquiry to award damages for trespass that was caused by a third party before the acquisition. As observed by Hashim Yeop A Sani J, para. 3 of the First Schedule stipulates the matters that the Land Administrator should not take into account in determining the amount of compensation. These matters include damages which are not actionable. It is an elementary principle of law that the tort of trespass if caused by a private person is a good cause of action.

[32] Plaintiff's counsel also cites the celebrated case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Ulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 4 AMR 123; [2017] 3 MLJ 561 to support his argument that the issue of trespass is a question that can only be decided by the court and no other person. With respect to counsel for the plaintiff, I cannot fathom how *Semenyih Jaya* supports his proposition that only the courts can decide the issue of trespass. The *ratio decidendi* of the Federal Court's decision in *Semenyih Jaya* is that s. 40D of the LAA, which stipulates that the amount of compensation to be awarded shall be the amount decided upon by two assessors, is *ultra vires* the Federal Constitution and should be struck down.

[33] I also cannot agree with the plaintiff's argument that D1 in not pleading in its defence that it had paid damages for trespass awarded to the plaintiff in borang H and D1 in not filing an application to strike out the plaintiff's writ of summons and statement of claim, supports the plaintiff's argument that D1 in an inquiry does not have the jurisdiction to award damages for trespass by a third party prior to the acquisition of land.

[34] I accept D1's submission that having argued against the plaintiff's application for summary judgment in encl. 18 that there are triable issues, it is not open to D1 to then file an application to strike out the claim on the grounds that that the action is obviously unsustainable. It is a general principle of law that a party cannot adopt different positions in the same suit: it cannot blow "hot and cold" ie, it cannot approbate and reprobate

(see *Cheah Theam Kheng lwn. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; [2012] 1 AMCR 369; [2012] 1 MLJ 761; *Express Newspapers Plc v. News (UK) Ltd And Others* [1990] 3 All ER 376).

[35] For these reasons, I find that the plaintiff's argument that trespass is not a good cause of action to be without merit. I am also unable to agree with his argument that the Land Administrator is prohibited by para. 3(c) of the First Schedule to the LAA from considering damages for trespass when determining the amount of compensation in an inquiry.

Can A Landowner Maintain An Action For Trespass For Prior Entry Into The Acquired Land?

[36] Having argued that trespass is not a good cause of action and the Land Administrator does not have the power to award damages for trespass, plaintiff's counsel conversely submits during the hearing of encl. 109 that the plaintiff's claim for late payment charges at the second inquiry was a claim for trespass. Plaintiff's counsel in his written submissions reproduced what he says is a passage from the judgment of Syed Ahmad Helmy J in *ASMTH Sdn Bhd & Anor v. Pentadbir Tanah Daerah Johor Bahru & Anor* [2007] 8 CLJ 445 and submits that:

> 64. With respect we submit that the above passage settles the question posed once and for all. An entry into the Plaintiff's land before issuance of a Notice under Section 8 of the Land Acquisition Act 1960 will give the registered proprietor of the land a right to maintain an action in trespass against trespasser. The fact that the land was subsequently acquired is not a defence.

[37] With respect, the plaintiff cannot on the one hand argue that trespass is not a good cause of action and on the other hand argue that entry onto the land prior to the acquisition of the land gives the landowner the right to maintain an action in trespass. It is trite law that a party cannot approbate and reprobate.

[38] The judgment in *ASMTH Sdn Bhd* as reproduced in the plaintiff's written submission is as below:

> The learned State Legal Adviser's response to this was that early entry into possession of scheduled lands cannot render the entire acquisition void but will only give rise to an action for damages for the tort of trespass against the trespasser. If a State Authority takes premature physical possession of land, that is possession taken prior to the publication of a s. 8 declaration or prior to the Land Administrator taking formal possession, and proceeds to cause damage to crops and trees or demolishes structures on the land, such acts only give rise to a cause of action for damages. In support of this, I was referred to passages in Kamleshwar Nath's Law of Acquisition and Compensation (Sixth Edition) (1978) and Om Prakash Aggrawala's Compulsory Acquisition of Land in India (1981).

In other words, if the authority had no power of compulsory acquisition, but had simply evicted the landowner from his property, he would have a right of action in trespass, and the basis upon which damages would be assessed for a trespass which deprived him of his property permanently provides the test for the assessment of compensation.

Similarly, in *Rickets v. Metropolitan Railway Co.* [1865] 34 LJQB 257, in the Court of Exchequer Chamber, Erie CJ, giving the judgment of the majority, said, at p. 261:

> The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in trespass for expulsion; and so it has been decided in *Jubb v. Hull Dock Co.*, 9 QB 443.

[39] Whereas the actual judgment of Syed Helmy J in *ASMTH Sdn Bhd* reads as below. The underlined words and paragraph numbers were omitted from the plaintiff's reproduction of the judgment in his submission. Anyone reading the submission may mistakenly conclude that the paragraphs were continuous and the words in the second paragraph were Syed Helmy J's rather than his quotation of Glidewell LJ's judgment in *Palatine Graphic Arts Co Ltd v. Liverpool City Council* [1986] QB 335.

> [30] The learned State Legal Adviser's response to this was that early entry into possession of scheduled lands cannot render the entire acquisition void but will only give rise to an action for damages for the tort of trespass against the trespasser. If a State Authority takes premature physical possession of land, that is possession taken prior to the publication of a s. 8 declaration or prior to the Land Administrator taking formal possession, and proceeds to cause damage to crops and trees or demolishes structures on the land, such acts only give rise to a cause of action for damages. In support of this, I was referred to passages in *Kamleshwar Nath's Law of Acquisition and Compensation* (Sixth Edition) (1978) and *Om Prakash Aggrawala's Compulsory Acquisition of Land in India* (1981).
>
> [31] I have studied in great detail the Indian authorities which both sides have brought to my attention to determine if any one of them shed some light on the issue before me. Regrettably, not a single one of the Indian cases deal with the issue at hand. The cases the applicants cited do not support their contention that premature entry into possession invalidates the entire acquisition proceeding. Those cases are only authority for the proposition that formal possession requires gazetting. That proposition is consistent with the scheme of our Act, which is borne out in the consummate judgment Lamin Yunus J handed down in *Hong Lee Trading & Construction Sdn Bhd v. Taut Ying Realty Sdn Bhd* [1991] 1 CLJ 121; [1991] 2 CLJ (Rep) 722. It is also my view that the Indian cases which I have been referred to and Hong Lee Trading are not authority for the proposition that premature entry into scheduled lands amounts to a breach of the requirements of the Act.

A [32] To my mind, the acquisition of scheduled lands commences when a s. 8 declaration is published in the *Gazette*. A declaration under that section is conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified therein. In this case, the declaration was published in the *Johor Gazette* on 12 February 2003. This is the date the acquisition commenced in this case. The question whether B an acquisition commenced properly ought only to be determined by reference to whether the requirements in s. 8 of the Act have been complied with. Once the acquisition is properly commenced, the Land Administrator can proceed to take formal possession of the land simultaneously or subsequently. This is done by making a note of the intended acquisition on the register of title pursuant to s. 9 of the Act and C issuing Form K under s. 22.

[33] In *Hong Lee Trading & Construction Sdn Bhd v. Taut Ying Realty Sdn Bhd* [1991] 1 CLJ 121; [1991] 2 CLJ (Rep) 722, Lamin Yunus J (later PCA) expressed the view that it is mandatory for the Land Administrator to take the steps set out in ss. 9 and 22 of the Act after the s. 8 declaration D is published. I must, with regret, part company with the learned judge here on account of precedent binding on me. The provisions in s. 9 are merely directory and not mandatory. The Federal Court decided this in *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314 where Eusoffe Abdoolcader J (as he then was) said:

E

The issue accordingly revolves into the question as to whether the provisions of s. 9(1) are mandatory or directory. We need only refer to *Pow Hing & Anor v. Registrar of Titles Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155, 157 (at p. 157) with regard to the connotation of this dichotomy, and applying the test laid down in the judgment of this Court F in that case for the distinction between mandatory and directory requirements in a statute and having regard to the conclusive evidence clause stipulated in s. 8(3) and the fact that s. 8(1) requires the declaration in Form D to be published in the *Gazette* for general information, we are of the view that the provisions of s. 9(1)(b) are directory and not mandatory as its purpose is in substance also covered by the publication G of the declaration in Form D in the *Gazette* under s. 8(1).

[34] On the authority of *S Kulasingam*, I am of the view that the State took formal possession of the scheduled lands in this case when Form D was published in the *Gazette*. The fact that Form K was issued later is irrelevant since compliance with s. 9(1) (which operates jointly with s. 22) is not H mandatory. The publication of Form D is the "act of acquisition" referred to in *Hong Lee.* The applicants allege that the State Authority had taken possession of the scheduled lands before the declaration under s. 8 was published in the *Gazette*. As formal possession of the scheduled lands can only be taken after the publication of the declaration in the *Gazette*, it is obvious that taking possession prior to that would be an act devoid of I legal authority and consequently, illegal. If a landowner is evicted from his property under such circumstances, the State will be liable for trespass

and a subsequent publication of a declaration in the *Gazette* would not reverse the illegal entry since the declaration has no retrospective effect. It is settled law that the State would be open to a suit for damages for trespass in cases where the State has prematurely taken possession of scheduled land. Glidewell LJ approved the following statement as a correct representation of common law on this issue in the case of *Palatine Graphic Arts Co. Ltd. v. Liverpool City Council* [1986] QB 335:

> In other words, if the authority had no power of compulsory acquisition, but had simply evicted the landowner from his property, he would have a right of action in trespass, and the basis upon which damages would be assessed for a trespass which deprived him of his property permanently provides the test for the assessment of compensation.

[35] Similarly, in *Rickets v. Metropolitan Railway Co.* [1865] 34 LJQB 257, in the Court of Exchequer Chamber, Erie CJ, giving the judgment of the majority, said, at p. 261:

> The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in trespass for expulsion; and so it has been decided in *Jubb v. Hull Dock Co.*, 9 QB 443.

[40] On close reading of *ASMTH Sdn Bhd*, I find that the facts of that case is distinguishable from this instant case. The applicants in *ASMTH* were not registered owners of the subject land. They had filed an application under s. 36(2) of the LAA to refer certain questions to the High Court, *inter alia*, whether the premature entry invalidated the acquisition. But the Land Administrator refused to make the reference to court. The High Court found that the action was not bad for duplicity because the second applicant, who had a legitimate interest pursuant to a privatisation agreement, did not have any legal or beneficial interest in the scheduled land. Thus, it did not have *locus* to ventilate its grievance at the land reference under s. 37 of the LAA. Syed Helmy J explained the difference between a reference under s. 36(2) and s. 37. He held that the application under s. 36(2) was not bad for duplicity even though there was a land reference proceeding taking place under s. 37. He said:

> [22] ... **Section 37 of the Act, on the contrary, deals with a situation where the Land Administrator has made an award and an objection is taken on any one or more of the specified grounds**. The legislature envisaged that the recourse to the court under s. 36(2) would be invoked before an award is made and the Inquiry complete since a determination by the court under s. 36(2) would have a direct bearing on the ultimate result of the Inquiry. **Since ss. 36(2) and 37 of the Act are designed to cater to distinct circumstances, this application is not bad for duplicity**.
>
> (emphasis added)

[41] The applicants in *ASMTH* had contended that the alleged early entry onto the land acquired invalidated the subsequent s. 8 declaration. The court held that there was no merit in the applicants' contention that trespass into scheduled land prior to the publication of the declaration in the *Gazette* would render the entire acquisition proceeding null and void. His Lordship held that early possession of the scheduled land gave the right to claim for damages for trespass from the date the State took possession of the lands up to the date the declaration was published in the *Gazette*. He said:

> [36] ... With respect, however, to learned counsel for the applicants, **I find there is no merit in the contention that trespass into scheduled land prior to the publication of the declaration in the *Gazette* renders the entire acquisition proceeding null and void**. The publication of the declaration in the Gazette puts the acquisition proceedings in motion when viewed from the vantage point that at this juncture, the State has decided that the scheduled land is required for the purposes specified in s. 3 of the Act. **As long as the declaration is not in any way defective, the acquisition is properly commenced. Once the declaration is published, the State's possession of the land after the date of publication is legal**. Just as the declaration cannot operate retrospectively to validate the possession of the land prior to its publication, early entry onto the land likewise cannot invalidate a declaration that is later properly published. If the allegation of premature entry in this case were true, the effect of the publication of the declaration in the *Johor Gazette*, in my view, is simply this - the possession of the scheduled lands, formal or physical, after the date of publication is proper and legal, and *possession of the scheduled lands prior to the publication was improper, thereby giving the dispossessed owner the right to claim damages for trespass from the date the State took possession of the lands up to the date the declaration was published in the Gazette*.
>
> (emphasis added)

[42] I find that read *in toto*, the references to *Palatine Graphic Arts* and *Ricketts* by Syed Ahmad Helmy J in paras. [34] and [35] of his judgment, supports the principle that compensation in the compulsory acquisition process under the LAA allows for compensation to be paid in the same manner as trespass for expulsion. To my mind, it is entirely without merit to conclude that the said references supports an argument that a claim based solely on trespass can be made in the courts outside the compulsory acquisition process and the specific statutory rights and remedies stipulated in the LAA 1980.

Law And Issues To Be Considered

[43] In this instant case, the State took formal possession of the land after the first declaration. The second declaration was published after the plaintiff wrote to D1 and the second inquiry was held. The plaintiff attended the second inquiry where he made a claim based on his own land valuation report. At the conclusion of the second inquiry, he accepted the award of compensation from D1 without protest.

[44] The plaintiff as the registered owner of the land is a "person interested" in the land. The plaintiff could have under s. 30(a) of the LAA after the second inquiry accepted the compensation awarded by D1 under protest.

[45] If he had accepted the compensation under protest, he could then make an objection under s. 37 of the LAA. Since he was dissatisfied with the amount of compensation awarded, he could have proceeded to make the objection under s. 37(1)(a) and file the Form N requiring D1 to refer the matter to the High Court. Section 37(1) of the LAA prescribes that a person interested in a land, who has accepted payment of the amount of an award under protest as to the sufficiency thereof, may make an objection, *inter alia*, to the amount of compensation. Section 38 of the LAA stipulates that the objection can be made by a written application in Form N requiring D1 to refer the matter to the High Court for its determination.

[46] Instead of pursuing the statutory remedy available to him under the LAA, the plaintiff filed this present action by way of a writ of summons seeking a declaration that the defendants had trespassed onto the Land. He also seeks general damages, mesne profit and exemplary damages for the alleged trespass for a period of ten years.

Can Declaratory Relief Be Granted Where There Is Specific Statutory Remedy?

[47] The High Court in *Tan Yoke Kwee & Ors v. Sistem Lingkaran Lebuhraya Sdn Bhd & Ors* [2010] 2 CLJ 653; [2009] 5 AMR 444; [2009] MLJU 215 held that the process for compensation for land acquired is under the LAA and not the court. Zaleha Zahari J (as she then was) held that:

> [13] The grievance of the plaintiffs whose lands had been compulsory acquired clearly relates to the amount of compensation that should be payable to them. That being so, the procedure that should have been followed by these plaintiffs must necessarily be that as prescribed under s. 36, 37 and 38 of the Act. Their claim by way of originating summons was clearly misconceived.

[48] The Court of Appeal in its judgment relating to encl. 45 of this instant case said that:

> [10] The decision in *Tan Yoke Kwee & Ors* highlights the necessity to pursue any claim for compensation by adhering to procedure as prescribed in the Act, and not by way of any action extraneous to the Act.

[49] In *Lembaga Lebuhraya Malaysia v. Cahaya Baru Development Bhd* [2010] 4 CLJ 419; [2009] 5 MLJ 14, the respondent land owner at the conclusion of the land inquiry accepted the award of compensation for the acquisition of his land. Lembaga Lebuhraya Malaysia ("LLM"), who the Court of Appeal referred to as "the paymaster" of the compensation awarded,

objected to the amount of compensation by filing the requisite Form N. Before the commencement of the land reference proceedings, the respondent applied and the High Court granted the declaratory reliefs that LLM was not entitled to file the Form N and that the Form N was void and of no legal effect. The Court of Appeal held that the declaratory relief sought by the owner of the acquired land in that case should not have been granted by the High Court. This is because an alternative remedy exists by way of land reference proceedings prescribed under the LAA. The landowner appealed against the Court of Appeal's decision. The appeal was dismissed by the Federal Court which held that LLM as the "paymaster" was a "person interested" within the meaning of s. 37(1) read with s. 37(3) of the LAA (see *Cahaya Baru Development Berhad v. Lembaga Lebuhraya Malaysia* [2010] 8 CLJ 761; [2011] 3 AMR 23; [2011] 2 MLJ 729 FC).

[50] The Federal Court in *Manggai v. Government of Sarawak* [1970] 1 LNS 80; [1970] 2 MLJ 41 held that the High Court was right in refusing to make the declaration sought because the applicant did not pursue the alternative remedy available to him of an appeal to the Native Court of Appeal. Gill FJ in delivering the judgment of the Federal Court held that:

> **It is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available** (see Halsbury's Laws of England, 3rd edition, volume 22, page 749, paragraph 1611). To quote but a few authorities in support of that proposition, Lord Herschell said in *Barraclough v. Brown* [1897] AC 615 620:
>
> > It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, *I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court, he can come first to the High Court to have his right to recover - the very matter relegated to the inferior court - determined. Such a proposition was not supported by authority, and is, I think, unsound in principle*.
>
> In *Pasmore v. The Oswaldtwistle Urban District Council* [1898] AC 387 394 Earl of Halsbury L.C. said:
>
> > … *The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law*.
>
> In the more recent case of *Wilkinson v. Barking Corporation* [1948] 1 KB 721 724 Asquith L.J. said:
>
> > … *It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its*

enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others.

(emphasis added)

[51] The respondents in *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1980] 1 LNS 150; [1981] 1 MLJ 234, who were the registered owners of the subject land were dissatisfied with the decision of the Director of Land and Mines, Federal Territory. However, instead of appealing the decision of the Director of Land and Mines, Federal Territory under s. 418 of the National Land Code ("NLC"), they filed an originating summons at the High Court seeking a declaration that they were not required to apply for change of category of land use prior to the application for amalgamation and subdivision of the subject land. Section 418 of the NLC reads as follows:

418. (1) Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

[52] The Federal Court held that on a proper reading of the NLC it was clear that Parliament by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. It held that as the right and remedy under s. 418 of the NLC are *uno flatu* (ie, the right and remedy are not mutually exclusive) and the fact there is a time limit stipulated in the s. 418 within which to enforce the right, the court has no jurisdiction to entertain the respondent's claim for a declaratory relief. Raja Azlan Shah Ag LP (as HRH then was) held that:

First of all we have to see the nature of the claim. It is an action for a declaration that conversion is not necessary before sub-division. That is a question of law by virtue of a statutory provision in section 124 of the National Land Code. If the relevant authority commits an error in the interpretation of the section, then an aggrieved party has a right of appeal to the High Court under section 418 of the Code. Parliament has on the ground of public policy found that that is a just and necessary right. But in the same section Parliament has also enacted a special procedure of enforcing that right. *If the right had been simply created and no specific method of enforcing it had been provided for, the existing law itself would have provided a method through the court already invested with jurisdiction to determine a claim of that nature. But a specific method having been created by providing a time-limit within which the right may be pursued, it becomes a question whether that method is exclusive or not*. That depends, not upon any rigid rule, but upon the intention of Parliament appearing from the Code.

...

> Reading section 418 of the Code, we are satisfied that the latter [i.e. the right and remedy are *uno flatu*, that they are not mutually exclusive] is the correct interpretation. *Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time-limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it*.
>
> (emphasis added)

[53] The Federal Court had in *Harper Gilfillian* concluded that the right and remedy in s. 418 of the NLC to be *uno flatu* because it stipulated the time-limit within which the aggrieved party can seek the remedy under the said section. As quoted above, Raja Azlan Shah Ag LP had held that the time-limit was the foundation of s. 418 and His Lordship was of the view that "it is in the highest degree improbable that the period of three months as a limitation would be inserted if an indefinite period was intended to be given." His Lordship held that the time limit "was obviously for the purposes of preventing stale claims." The Federal Court concluded that because the right and remedy in s. 418 was *uno flatu* ie, not mutually exclusive, accordingly s. 418 bars declaratory relief.

Are The Rights And Remedies Under The LAA Uno Flatu?

[54] The LAA provides specific remedies for interested persons who are dissatisfied with the sufficiency of amount of award received from the Land Administrator. I find that it limits the remedy available to the interested person by expressly stipulating the following:

(a) the manner in which interested person can make the objection i.e.

  (i) by not accepting the Land Administrator's award; or

  (ii) by accepting payment of award under protest as to the sufficiency of the amount of the award (see s. 37(1));

  (iii) by requiring the Land Administrator to refer the matter to court for its determination (see s. 38(1));

(b) the grounds of the objection (see s. 37(1)(a), (b), (c));

(c) the form and content of the application (see s.c38(1) and (2));

(d) the time limit to make the application to the Land Administrator i.e.

  (i) within six weeks from the date of Land Administrator's award under s. 14 (see s. 38(3)(a)); or

(ii) within six weeks of the notice of the Land Administrator under s.16 or within six months from the Land Administrator's award under s. 14, whichever period shall expire (see s. 38(3)(b)); and

(e) the person who can make the reference to the court ie, only the Land Administrator (see s. 36(1)).

[55] It is clear from the above analysis of the LAA that the Act stipulates not only the time limit (as in s. 418 of the NLC) but also the manner; the grounds, the form and content of the objection; and the person who can make the reference to court.

[56] Accordingly, I conclude from the plain reading of ss. 30, 36, 37 and 38 of the LAA that the rights and remedies under the LAA are *uno flatu* for a person dissatisfied (be it the landowner or the "paymaster" as decided by the Federal Court in *Cahaya Baru*) with an award by the Land Administrator. For this reason, based on the decision of the Federal Court in *Harper Gilfillian*, I find that this court has no jurisdiction to hear the claim for declaratory relief sought by the plaintiff in this present suit.

[57] The plaintiff could have enforced his right in accordance with the LAA and if he had done so, to paraphrase the Federal Court in *Metal Industry Employees Union v. Registrar of Trade Unions & Ors* [1975] 1 LNS 104; [1976] 1 MLJ 220 his claim "would have been settled one way of another." Lee Hun Hoe CJ (Borneo) held that:

> The matter would have been settled one way or another if an appeal had been made to the Minister under section 17 of the said Ordinance instead of pursuing the matter in courts ...

Is A Cause Of Action Anchored Solely On Trespass Sustainable?

[58] The High Court in *Ng Chee Keong & Ors v. Lembaga Letrik Negara & Anor* [1991] 1 CLJ 567; [1991] 3 CLJ (Rep) 323, held that as the ownership of the subject land had been compulsorily acquired and ownership of the land transferred to the first defendant, Lembaga Letrik Negara ("LLN"), the court held that the plaintiff's cause of action in that case which was anchored solely on the tort of trespass "cannot in any way be sustainable." Lim Beng Choon J held that:

> However, that may be three factors are indisputable and they are that:
>
> (i) the cause of action of the plaintiffs are solely anchored on the tortious act of trespassing on the part of the defendants on the portion of the land in question.
>
> (ii) the portion of the land had been duly and compulsorily acquired by the government under the Land Acquisition Act 1960.

A (iii) as a result of the compulsory acquisition under the Land Acquisition Act, ownership of the portion of land in question was duly transferred to the 1st defendant and duly registered *vide* title HS(D) 841 Lot 405.

It is beyond any doubt, based on the indisputable factors adumbrated
B **above, that the plaintiffs' cause of action anchored solely on trespass cannot in any way be sustainable**.

(emphasis added)

[59] The plaintiff in *Ng Chee Keong* pleaded in their reply to LLN's defence that there had been non-compliance with the proper procedure under the
C LAA. Lim Beng Choon J said that:

"In any case if the plaintiffs were challenging the validity of the acquisition they are precluded from doing so by a writ action because under the provisions of the Land Acquisition Act the only matters that can be litigated by the Court are limited to matters as prescribed in part V of the
D said Act namely:

(a) the measurement of the land;

(b) the amount of compensation;

(c) the person to whom it is payable;

E (d) the apportionment of the compensation (see s. 37 of the said Act).

More importantly s. 68 of the said Act which reads:

No suit shall be brought to set aside an award or apportionment under this Act.

F bars the plaintiffs from asking for compensation at market value and loss of income which amounts to bringing a suit to set aside the award of RM5112.50 made by the appropriate authority.

[60] Idrus Harun JCA in the judgment of the Court of Appeal as regards encl. 45 of this case, said the following about *Ng Chee Keong*:

G The above case undoubtedly showed a foursquare position and was indeed in point with the present appeal, and therefore a claim for trespass in the present action could not in any away be sustainable.

[61] I am persuaded that the decision *Ng Chee Keong* is correct and that a cause of action based solely on trespass is not sustainable. This decision is
H in line with all the other cases and the legal principles discussed herein.

Conclusion

[62] For the reasons above, I am of the view that the answer to the question of law posed for this court's determination in this application is "Yes".

I **[63]** Therefore, I find that the plaintiff is precluded from maintaining an action for trespass against the defendants after having accepted D1's award of compensation without any objection.

[64] Accordingly, pursuant to the terms of the consent order dated 25 January 2018, the plaintiff's action is hereby struck-off with costs of RM10,000 each for the first, second and third defendants subject to the payment of the allocator fee. The costs are to be paid by the plaintiff to the each of the defendants.

Endnotes:

1. Exhibit "A1"
2. Exhibit "LCK10"
3. Exhibit "A3"
4. Exhibit "A1-6" p 33